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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

ADRIAN RISKIN, Petitioner, vs. LARCHMONT VILLAGE PROPERTY OWNERS ASSOCIATION, Respondent.	Case No.: BS172934 **REPLY BRIEF IN SUPPORT OF MOTION FOR AWARD OF ATTORNEY'S FEES AND COSTS** DATE: November 21, 2019 TIME: 1:30 P.M. DEPT: 82 JUDGE: Hon. Mary H. Strobel

In its Opposition, Respondent ("the BID") argues that Petitioner should be awarded no fees, or that fees should be substantially reduced, because Petitioner's lawsuit was allegedly unnecessary and motivated by an improper purpose. In making its arguments, the BID misapplies law and relies on a number of false factual assertions that are contradicted by evidence in the record. As will be shows, the BID's arguments are without merit.

The BID does not challenge that Petitioner is the prevailing party, that Petitioner's claimed hourly rate is reasonable, or that Petitioner's hours are reasonable, with the exception of hours claimed for travel. Thus, this Court should award Petitioner $73,599.63 for costs and fees in this matter: $56,892.04 sought in the Motion for Attorney's Fees ("Fee Motion"), $6,187.59 for fees and costs incurred enforcing the Court's Order, and $10,520 for "fees on fees" incurred since Petitioner filed the Fee Motion in this matter.

I. THIS LITIGATION WAS NECESSARY TO ENFORCE THE CPRA.

The Court, in its June 17 Order in this matter, granted Petitioner's writ of mandate and declared Petitioner the prevailing party entitled to fees. Despite this, the BID argues against any award of attorney's fees on the basis that the litigation was "completely unnecessary" was brought "in bad faith" and "smacks of blatant 'setup'." The BID's claims are legally baseless and the BID relies on clear falsehoods to make its arguments.

A. Unlike CCP § 1021.5 claims, a CPRA litigant is not required to show pre-litigation attempts at resolution to recover fees, however, contrary to the BID's assertions, Petitioner but made multiple efforts to resolve this matter before filing suit.

The BID's argues that Petitioner's lawsuit was "unnecessary" because Petitioner allegedly went on "radio silence" rather than attempt to resolve the dispute prior to filing suit. The BID's argument is legally baseless and relies on blatant misstatements of facts. The BID cites *Graham v. DaimlerChrysler Corp* (2004) 34 Cal. 4th 553 ("*Graham*") for the proposition that Petitioner cannot recover fees because Petitioner allegedly failed to attempt to settle the dispute prior to litigation. (BID Opposition 6, 7.) The BID errs in relying on *Graham*. That case dealt with whether and under what circumstances CCP § 1021.5 permits recovery of fees pursuant to the catalyst theory. (*Graham* at 559-561.) Here, Plaintiff is seeking fees under the CPRA (Gov. Code § 6259), not CCP § 1021.5.

The two schemes are not coextensive and the CPRA does not contain either a meet and confer requirement, or a requirement that a requestor send a prelitigation demand or otherwise exhaust administrative remedies to recover fees. Further, *Graham* dealt with the catalyst theory which applies "when litigation does not result in judicial resolution if the defendant changes its behavior substantially because of, and in the matter sought by, the litigation." (*Graham* at 560.) Here, the catalyst theory does not apply: Petitioner obtained judicial resolution, including a granting of the writ of mandate, a finding the BID violated the CPRA, and a determination that Petitioner is the prevailing party entitled to fees in the Court's June 17, 2019 order. *Graham* does not apply.

Even assuming, *arguendo*, *Graham* applied, Petitioner made numerous efforts to resolve this without litigation. The BID's arguments to the contrary rely on blatant falsehoods. The BID falsely states that Petitioner sent no communications between April 19, 2017 and February 17, 2018. (i.e., "following Ms. Flynn's April 19, 2017 response [concerning CPRA requests not at issue in this litigation] I have heard nothing further from her and believed that my client had fully complied with all of Mr. Riskin's CPRA requests. Neither my client nor I had any further communication from Mr. Riskin or from anyone acting on his behalf until 10 months later, on or about Feb 17, 2018." (Cairns Dec. ¶ 12).) The BID references this assertion repeatedly in an effort to argue that, because Petitioner did not contact the BID for ten months, the litigation was "unnecessary." (BID Opposition 4:25-5:3; 5:9-10; 5:24) The BID's assertions – (1) that Petitioner sent no communication during that period; and (2) that Mr. Cairns believed the BID had no further obligations to respond to Petitioner's CPRA requests – are demonstrably false.

Petitioner's exhibits show that Petitioner sent multiple communications during that period, and Mr. Cairns responded via email expressing knowledge that the BID had to produce additional records.[1]. Petitioner sent multiple communications to the BID, including submitting the three requests at issue in this litigation, after Mr. Cairns April 16, 2017 email to Ms. Flynn. Mr. Cairns' April 16 email to Ms. Flynn (providing records in response to requests not at issue in this litigation) was sent at 1:50 p.m. (Cairns Decl. Ex. 4) Later that day, at 7:50 p.m., Petitioner submitted what has

[1] Notably, even if Petitioner had been silent, the BID concedes that Petitioner contacted it twice before litigation to inform the BID it had not yet responded to the requests: on February 17, 2018, and again on March 12, 2018.

been previously referred to as Request #1. (Riskin Merits Decl. Ex. A) Of course, because Petitioner sent this request *after* the BID produced records in response to the prior request, the BID could not reasonably believe that its prior production satisfied this request. On April 17 Petitioner submitted Request #2. (Riskin Merits Decl. Ex. A.) As with Request #1, the BID could not reasonably believe its April 16 disclosure satisfied this request. After Ms. Flynn's April 19 acknowledgement of Mr. Cairns' April 16 disclosure, Petitioner sent the following additional communications: a follow-up to Request #2 on April 28 (Riskin Merits Decl. Ex. B); a follow-up to Request #1 on May 2 (Riskin Merits Decl. Ex. B); Request #3 on May 2 (Riskin Merits Decl. Ex. B); follow-ups to Requests #1 and #2 on May 11 (Riskin Merits Decl. Ex. B); and a follow-up to Request #3 on May 30 (Riskin Merits. Decl. Ex. B). And, of course, Petitioner made further attempts to obtain records without litigation via emails sent on February 17, 2018 (Riskin Merits Decl. Ex. B) and March 12, 2018 (Cairns Decl. Ex. 8). These facts were accepted as true by the Court in its June 18 order and, thus, are not in dispute. Petitioner contacted the BID numerous times before proceeding to litigation and the BID relies on falsehoods when arguing to the contrary.

The BID also misrepresented facts as to Mr. Cairns' knowledge of the additional CPRA requests. In his declaration, Mr. Cairns claims that,

> Upon receiving Mr. Cisneros' letter of September 17, 2018, I reviewed the referenced exhibits to the Petition and realized, <u>for the first time</u>, that Mr. Riskin has sent, or purported to send additional CPRA requests between the date of my April 16, 2017 transmission of records to Ms. Flynn and her final email of April 19, 2017 thanking me for fulfilling her client's request. (<u>emphasis added</u>) (Cairns Decl. ¶ 21.)

This is plainly false. On May 16, 2017, Mr. Cairns responded to Petitioner's May 11 follow-up regarding Request #2. (Riskin Merits Decl. Ex. B) In that email, Mr. Cairns himself states "[t]he LVBID is currently reviewing your request and its records. We expect to respond further within the next 14 days." <u>Thus, not only was *someone* at the BID aware of Petitioner's subsequent requests, but *Mr. Cairns was personally aware* of the request and the BID's obligation to respond</u>. The BID did not respond within 14 days, nor did it respond after Petitioner contacted it on February 17, 2018 and March 12, 2018.

In conclusion, the BID relies on blatant falsehoods to argue that Petitioner made no effort to notify the BID of its obligation to respond prior to initiating litigation. Petitioner repeatedly contacted the BID after submitting the three requests and prior to filing suit. Even assuming, *arguendo*, the CPRA imposed a meet and confer or exhaustion requirement, which it does not, Petitioner would have met that test. This litigation was necessary.

B. An agency is not permitted to ignore a request until contacted by an attorney and the BID's suggestion to the contrary shows its hostility to the CPRA.

The BID argues that Petitioner should be denied fees because Petitioner's counsel did not contact the BID prior to filing suit. This argument has a troubling implication: that an agency is at liberty to ignore a CPRA request until the requestor can retain an attorney. This is not in keeping with the CPRA's promise of access to public records. The BID's own evidence shows that, in response to Petitioner's previous requests, it delayed access to records for four months and only provided records once Petitioner retained attorney Colleen Flynn to submit a demand letter. (Cairns Exs. 2, 3) Here, Petitioner attempted to obtain the records without litigation multiple times. But the BID argues that it has no liability for fees because no attorney contacted the BID prior to litigation. This rule, if adopted, would condition all access to records on a requestor's ability to retain an attorney and would encourage agencies to simply deny all requests until the moment an attorney gets involved. The rule would stifle access because a requestor would either have to pay an attorney for a pre-litigation demand letter or find an attorney willing to do such work for free. This is not in keeping with the CPRA's statutory framework which is meant to provide requestors with "protections and incentives" to enforce the right to records via litigation. *Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 427.

In conclusion, the BID's arguments regarding "necessity" fail. In contrast to CCP § 1021.5, the CPRA has no requirement that a requestor give the agency another "bite at the apple" by attempting to resolve denials or refusals to respond before litigation. Even if the CPRA contained such a requirement, here Petitioner gave the BID multiple opportunities and the BID relies on blatant falsehoods to argue the contrary. Finally, the BID's argument that it can ignore all CPRA requests until contacted by an attorney is without merit. Petitioner should be awarded full fees.

II. THIS LITIGATION IS NOT FOR AN IMPROPER PURPOSE.

This litigation is for the proper purpose of enforcing the CPRA. The BID blatantly misleads the Court in asserting that Petitioner's blog announces an improper purpose for this litigation and the evidence shows that, at every stage, Petitioner sought to obtain the requested records.

A. Petitioner's blog does not state an improper purpose for this litigation.

The BID blatantly misleads the Court in arguing that Petitioner's blog announces an improper purpose for this CPRA litigation. The blog post makes no mention of CPRA litigation and suggests only that instances of legal violations by BIDs be reported to the City Council pursuant to the CA Business and Professions Code. After claiming that Petitioner published the purpose of this litigation on his blog, the BID cites to Cairns Decl Ex. 13 and characterizes the exhibit thusly:

> As outlined in Riskin's blueprint for BID destruction, his strategy is to play a game of "gotcha" by issuing frequent, overlapping and confusing CPRA records requests in order to trap BIDs into technical violations of law and then bankrupt them through litigation – at least if they have not already been driven into bankruptcy by the burden of responding to the requests. (BID Opposition 7:19-22.)

The BID's characterization is total fiction. In reality, the blog post advocates BID accountability in the form of reporting BID legal violations. First, the blog cites the Business and Professions Code which mandates that a City Council shall notice a hearing on disestablishment of a BID when it makes a finding that a BID violated the law in connection with its duties. Then, the blog suggests that the public report instances of BID violations so the City Council can act in accordance with the Business and Professions Code, stating:

> The method is essentially the broken windows theory for white collar BID crime. Pay attention to the BIDs. They will break the law. Turn them in for every possible law they break just like they do to homeless people who they're targeting for forced relocation. We're targeting the BID's for forced relocation. (Cairns Decl. Ex. 13.)

In discussing which laws the BIDs break, the blog states, "[t]hey violate the Brown Act on a regular basis. They violate the California Public Records Act on a regular basis. They commit years-long serial civil rights violations. They violate the ethics laws of the City of Los Angeles." (Cairns Decl.

Ex. 13.) Nowhere does the blog suggest "creating" violations of law by issuing "frequent, overlapping and confusing CPRA records requests in order to trap BIDs into technical violations." Nowhere does the blog suggest submitting CPRA requests for the purpose of draining BID resources. Nowhere does the blog suggest filing CPRA litigation for the purpose of "bankrupting" BIDs. Nowhere does the blog announce *any* purpose for this, or any other, CPRA litigation, let alone an improper purpose. It cannot be stated strongly enough, when the BID claims that Cairns Decl. Ex. 13 announces an improper purpose for this litigation, or contains a "blueprint" on how to use the CPRA to "bankrupt" BIDs, the BID is lying to the Court about the contents of an exhibit.

By making this clearly false assertion, Mr. Cairns' engages in conduct that is, at best, unprofessional, and is, at worst, sanctionable. (See CCP § 128.7(b) [by presenting a signed filing to the Court, an attorney certifies that the factual contentions have evidentiary support, if a Court determines that requirement has been violated, it may sanction the violating attorney or party].

Further, by asserting Petitioner's blog is justification for denying a fee award, the BID shows its plain contempt for the CPRA and the democratic norms it expresses and protects. The BID's argument is essentially this: Petitioner is politically opposed to the activities of BIDs and, thus, any lawsuit by Petitioner to enforce the CPRA is de-facto illegitimate and for an improper purpose. In other words, the BID argues that Petitioner is exempt from the CPRA's mandatory fee shifting provision and has a weaker right of access than an individual who does not politically oppose BIDs. This argument is beyond incorrect: it is anathema to the letter and spirit of the CPRA. It suggests that a requestor can be discriminated against on the basis of their purpose or political beliefs. The CPRA, of course, does not allow such discrimination. *See* Cal. Gov. Code §§ 6257.5, 6254.5; *see also Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645.

B. Petitioner's consistent efforts to obtain records as part of this litigation further shows that there was no improper purpose.

Further showing that this litigation is not for an improper purpose, Petitioner has steadfastly sought records pursuant to this litigation. The BID claims "[t]his case has never been about access to public records," (BID Opposition 7:23-24) and Mr. Cairns asserts that "Mr. Cisneros seemed to have little interest in talking about records and always wanted to talk about attorneys' fees." (Cairns

Decl. ¶ 18.) This claim, like many others from the BID, does not survive scrutiny.

Respondent's own exhibits contradict this assertion. Petitioner's initial demand letter plainly states "[a]ny settlement will have two components: the production of the requested records and a monetary component." (emphasis added) (Cairns Decl Ex. 9.) Petitioner's counsel's August 16 email to Mr. Cairns states, "[a]s I mentioned, any settlement will need to include the production of records. Is it feasible to have a timeline of production available when we discuss the case?" (Cairns Decl. Ex. 10.) In the September 17 letter to Respondent regarding its incomplete and inadequate production, Petitioner's counsel produced a detailed, three-page search protocol for locating the requested records and concluded that "[i]t is my hope that the records portion of this lawsuit can be resolved promptly, leaving only the monetary portion to be resolved." (Cairns Decl. Ex. 12.)

Additionally, Petitioner's counsel stressed the need for records in many other communications. As a sampling, Petitioner's counsel inquired as to record production on August 27, 2018, September 11, 2018, October 17, 2018, October 22, 2018, and January 14, 2019. (Cisneros Decl. Ex. A.) After this Court issued its Order, Petitioner's counsel inquired as to record production no fewer than 15 times, as documented in Petitioner's Ex Parte Application to Show Cause. Finally, when Respondent refused to produce either additional records, or declarations showing that any searches took place, Petitioner filed the Ex Parte Application to Show Cause to ensure that Respondent complied with the Court's order to locate and produce records. Thus, it is well-documented that Petitioner was, from the start, stalwartly dedicated to obtaining the requested records pursuant to this litigation, and, as such, that the litigation was for that proper purpose.

C. Petitioner's opening monetary offer is neither evidence of improper purpose nor is it a reason to reduce a fee award.

Petitioner's opening monetary offer and subsequent attempts to settle this litigation are neither evidence of improper purpose, nor cause to reduce a fee award. Rather, they are evidence of Petitioner's good faith effort to resolve this matter while preserving judicial resources and limiting the amount of attorney's fees incurred. The BID argues that Petitioner engaged in "extortion" and cites *Serrano v. Unruh* (1982) 32 Cal.3d 621 ("*Unruh*") to argue that, because Petitioner's initial monetary offer to settle this matter was allegedly "inflated," the Court should reduce the fee award

or deny it altogether. (BID Opposition 9:24-10:8.) Once again, the BID is wrong on both the law and facts.

Petitioner's initial monetary is neither extortion, nor cause to reduce Petitioner's reasonable and uninflated lodestar. As an initial matter, *Unruh* concerns an inflated request for fees as part of an application for attorney's fees, not an opening negotiating position. *Serrano v. Unruh* (1982) 32 Cal.3. 621, 635. Petitioner's fee request is not inflated and, aside from challenging travel hours, the BID does not argue to the contrary. Thus, *Unruh* does not apply.

Additionally, Petitioner's opening offer was not "inflated" and certainly did not constitute extortion. The offer never purported be the lodestar as of that date. Rather, the offer represented 40 hours of work which Petitioner stated would be less than Petitioner would incur if the BID refused to settle and the matter was litigated fully. (Cairns Ex. 9.) That statement has proven true. Further, before the BID ever made a counter, Petitioner reduced the offer by $3,000 and offered to accept payment in two increments as a show of good faith and willingness to bargain. (Cairns Ex. 10.)

While Petitioner was willing negotiate, the BID was not. The BID failed to make even a single monetary offer or counteroffer. Even after the Court found that Petitioner was the prevailing party entitled to fees, the BID refused to negotiate. Petitioner made every effort to resolve this matter without resorting to a fee motion – including offering to accept six payments over a one-year period to accommodate the BID's cash flow concerns (Cisneros Decl. ¶ 4.) Unfortunately, the BID did not respond. Now, the BID asks the Court to deny or substantially reduce an award of attorney fees in the hopes that the BID's intransigence and refusal to bargain will be rewarded. The Court should not reward such behavior. Petitioner's opening monetary offer is neither evidence of improper purpose nor is it a reason to deny or reduce a fee award.

III. PETITIONER SEEKS REASONABLE FEES, INCLUDING FEES FOR THE EX PARTE HEARING AND ADDITIONAL "FEES ON FEES."

The fees Petitioner seeks are reasonable, as is the 1.25 multiplier. This Court should award $73,599.63 total: the $56,892.04 Petitioner sought in the Fee Motion, $6,187.59 for compliance proceedings fees and costs, and $10,520 for additional "fees on fees" incurred since the Fee Motion.

A. Petitioner's hourly rate is unchallenged and its number of hours, including travel hours, are reasonable.

While the BID challenged the necessity of the lawsuit, asserted that Petitioner litigated for an improper purpose, and disparaged Petitioner's counsel as an "extortionist," the BID did not challenge the reasonableness of the hourly rate Petitioner's counsel seeks. The BID also did not challenge the reasonableness of any of Petitioner's hours, aside from travel hours. Thus, it seems the parties are in agreement that Petitioner's $400 hourly rate and the non-travel hours submitted for the lodestar are reasonable.

The BID also did not explicitly challenge Petitioner's sought-for 1.25 multiplier to the lodestar to approximate market compensation by accounting for contingency risk and delay of payment. For all the reasons stated in the Fee Motion, a 1.25 multiplier to the lodestar is appropriate.

As to the travel hours, the BID challenges Petitioner billing for six (6) hours of travel each way for hearing, alleging that the availability of flights makes Petitioner's travel hours unreasonable. Respondent's argument is without merit. As an initial matter, Petitioner is already only seeking a 1/2 rate for travel time.[2] In other words, Petitioner is seeking three (3) hours of travel time each way. It is likely that it would have taken at least 3 hours each way via air travel, when including time traveling to and from airports along with time being processed through airport security. Additionally, the BID would then be responsible for flight costs and car rentals. Lastly, the BID is entirely responsible for Petitioner having to travel to the second merits hearing because it was the BID's baseless jurisdictional defense – and misrepresentations to the Court – that made the second hearing necessary. It is reasonable for Petitioner to seek 24 hours of travel at a 1/2 rate.

B. The Court should award fees for time spent on compliance proceeding and fees for time spent on this Reply.

In addition to the reasonable fees sought in Petitioner's Fee Motion, this Court should award an additional $16,707.59 in fees and costs incurred enforcing the Court's order and additional fees on fees. Petitioner was forced to initiate compliance proceedings because the BID neglected its

[2] There is a discrepancy between Petitioner's Memorandum of Points and Authorities ("MPA") and the Cisneros Declaration in Support of the Fee Motion. The MPA correctly states that Petitioner is seeking travel time at a 1/2 rate, while the declaration incorrectly states Petitioner is seeking travel time at a 1/3 rate.

obligation to comply with the Court's Order. Petitioner contacted the BID no less than 15 times regarding compliance with the Order, and plainly stated that unless the BID provided declarations showing compliance that Petitioner would be forced to initiate compliance proceedings. The BID ignored those messages, leaving Petitioner with no choice but to incur hours on the Ex Parte hearing. Then, after the Court continued the hearing and ordered the BID to lodge declarations detailing its search, Petitioner offered to take the continued hearing off calendar if the BID provided declarations before Petitioner had to begin preparing additional materials. The BID failed to do so, forcing Petitioner to incur even more hours. The Ex Parte proceedings were necessary as compliance proceedings and the BID had every opportunity to avoid incurring those hours by voluntarily producing the requested declarations. Petitioner should be awarded $5,850 in fees and $337.59 in costs as detailed in the supporting declaration. (Cisneros Decl. ¶6.)

Further, Petitioner should be awarded $10,520 for "fees on fees" hours incurred since Petitioner submitted the Fee Motion, including time spent reviewing the BID's opposition and preparing this Reply, and time that will be incurred traveling to, preparing for, and attending hearing. (Cisneros Decl. ¶ 8.)

IV. CONCLUSION

The BID could have avoided this litigation by properly responding to Petitioner's CPRA requests; it failed to do so. The BID could have resolved this litigation early by working with Petitioner's counsel to produce all requested records and negotiate a settlement for costs and fees; it failed to do so. After the Court's Order, the BID could have resolved fee liability and avoided compliance proceedings by providing declarations regarding compliance and engaging in settlement negotiations; it failed to do so. Petitioner is the prevailing party and should be awarded $73,599.63 in fees and costs: the $56,892.04 sought in the Fee Motion, $6,187.59 in fees and costs for compliance proceedings, and $10,520 for fees incurred for this Reply and the hearing.

Dated: November 13, 2019

By: _____
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Attorney for Petitioner